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Supreme Court, U.S.
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No. 95-1332

In The

# Supreme Court of the United States

October Term, 1995

FRANCISCO SILVA,

*Petitioner,*

v.

CITY OF MADISON,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT.

2. ALTERNATIVELY, WHETHER, IN A REMOVED ACTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 81(c), WHERE THE DEFENDANT HAS NOT BEEN SERVED WITH PROCESS AND HAS NOT ANSWERED THE COMPLAINT, THE DISTRICT COURT MAY ENTER DEFAULT JUDGMENT.

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## CITATION OF OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit has been published at the following cite: *Silva v. City of Madison,* 69 F.3d 1368 (7th Cir. 1995).

The Respondent otherwise agrees with the Petitioner's citations of opinions below.

## RULES PRESENTED FOR REVIEW

In addition to the statutes and rules listed by the Petitioner in his Petition for a Writ of Certiorari, the following rules are also applicable to the issues on which Petitioner seeks Supreme Court Review:

Fed.R.Civ.P. 12(a)

> **(a) When Presented.** A defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state.

Fed.R.Civ.P. 55(b)

> **(b) Judgment.** Judgment by default may be entered as follows:
>
> (1) ***By the Clerk.*** When the plaintiff's claim against a defendant is for a sum certain or for a sum upon which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter

judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) ***By the Court.*** In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

## STATEMENT OF THE CASE

On October 19, 1992, the plaintiff, Francisco Silva ("Silva"), commenced a civil action, Case No. 92-CV-4224, against the City of Madison ("City") in Dane County Circuit Court, Madison, Wisconsin, alleging employment

discrimination and retaliation based upon an alleged violation of his rights under 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1983. The City removed Silva's action to the United States District Court for the Western District of Wisconsin. On November 16, 1992, Silva moved the court for entry of default judgment. At the time Silva moved for entry of default judgment, it was undisputed that Silva had not served the City with process. At the December 1, 1992, preliminary pretrial conference, the district court judge heard oral argument on Silva's motion for entry of default judgment and denied the motion. The district court also heard argument at this time on Silva's motion for reconsideration and denied the motion for reconsideration.

Silva subsequently served the Madison City Clerk's office with process. The parties engaged in pretrial discovery. The City moved the court for partial summary judgment which was granted in part and denied in part. Silva's claims were tried to a jury on April 12-15, 1993. The jury returned a verdict for the City on all counts. The trial court entered judgment for the City, dismissing with prejudice and costs Silva's Complaint in its entirety.

Silva appealed the trial court's denial of his motion for entry of default judgment. The United States Court of Appeals for the Seventh Circuit affirmed the district court decision and held that Rule 81(c), Federal Rules of Civil Procedure, does not permit a trial court to enter a judgment by default against a defendant which has not been served with process. Alternatively, the United States Court of Appeals for the Seventh Circuit held that the district court did not abuse its discretion in denying Silva's motion for entry of a default judgment.

On or about February 14, 1996, Silva filed his Petition for a Writ of Certiorari, challenging the decisions by both the trial court, which denied Silva's motion for default judgment, and the United States Court of Appeals for the Seventh Circuit, which affirmed the trial court's decision.

## SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari raises the settled issue of law whether the trial court abused its discretion in denying Silva's Motion for Entry of Default Judgment. There is nothing novel about this issue which would justify Supreme Court review. Silva sued the City of Madison, Wisconsin in state court. The City removed the action to the United States District Court for the Western District of Wisconsin, although the City had not been served with process, to preserve its right to a federal forum on Silva's federal claims. Silva moved for default judgment without serving the City with a summons and complaint. The trial court, in the exercise of its discretion, denied Silva's motion. The United States Court of Appeals for the Seventh Circuit found that the trial court had not abused its discretion in denying the motion for default judgment. Petitioner now seeks a writ of certiorari to review the decision of the court of appeals.

The law is clear that default judgments are disfavored in the law and that the policy under federal case law and the Federal Rules of Civil Procedure is for a trial on the merits. Such a trial occurred in the present case and the jury, after hearing all of the evidence on the merits, returned a verdict in favor of the City. Entry of

default judgment by a federal clerk under Rule 55(a), Federal Rules of Civil Procedure, is not permitted where there has not been service of process on the defendant. The law is clearly settled that the trial court has discretion to grant or deny a motion for default judgment. The trial court exercised this discretion and determined in the present case that entry of default judgment was inappropriate. The United States Court of Appeals for the Seventh Circuit reviewed the trial court's exercise of its discretion and concluded that the trial court had not abused its discretion in denying Silva's motion for default judgment. There is no reason for the United States Supreme Court to review a routine exercise of discretion by a trial court.

The Petitioner argues that in a removed case, service of process is not necessary to require a defendant to answer and that a trial court may enter default judgment even though it is undisputed that there has been no service of process on the defendant. Federal case law, the Federal Rules of Civil Procedure and fundamental fairness require service of a summons and complaint upon a defendant before default judgment may be entered. This has been the established law for a considerable period of time. There is no conflict in the federal circuits on the issue of whether Rule 81(c), Federal Rules of Civil Procedure, allows entry of default judgment in a removed action against a defendant who undisputedly has not been served with process. Accordingly, Petitioner has provided no justification for the United States Supreme Court to allocate its limited resources for review of the issues in the present action.

The Respondent City of Madison, Wisconsin, respectfully requests that the United States Supreme Court deny the Petitioner's Petition for Writ of Certiorari.

## ARGUMENT

### I. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE PETITIONER'S REQUEST FOR A DEFAULT JUDGMENT.

Without serving process on the Defendant City of Madison, Wisconsin, Silva moved the trial court for default judgment. The trial judge, in the exercise of his discretion, denied Silva's motion. The United States Court of Appeals for the Seventh Circuit affirmed, holding that the trial court did not abuse its discretion in denying Silva's request for default. The law is well settled that a trial court has discretion to grant or deny a motion for default judgment. The trial court's exercise of its discretion, in this case, is dispositive of all issues in Silva's Petition for a Writ of Certiorari. The Supreme Court should not waste its limited resources to consider an issue of law which is well settled in the federal circuits.

Defaults are not favored in the law and any doubts should be resolved in favor of the alleged defaulting party. 10 Wright, Miller & Kane, Federal Practice and Procedure: Civil § 2681, pp. 402-03 (1983); *Lee v. Brotherhood of Maintenance of Way Employees*, 139 F.R.D. 376, 381 (D.C. Minn. 1987). Federal circuit courts, including the Seventh Circuit, have observed "this circuit has a well

established policy favoring a trial on the merits over a default judgment." *C.K.S. Engineering, Inc. v. Wright Mountain Gypsum Company*, 726 F.2d 1202, 1205 (7th Cir. 1984). The *C.K.S. Engineering, Inc.* court further observed:

> The court has stated many times and district court judges are well aware that defaults should be entered only when absolutely necessary, such as where less dramatic sanctions have proved unavailing.

*Id.* at 1206; *citing Inryco, Inc. v. Metropolitan Engineering Company*, 708 F.2d 1225, 1230 (7th Cir.), *cert. denied*, 464 U.S. 937 (1983).

Default judgments are particularly disfavored in certain types of actions, including actions involving material issues of fact, actions in which substantial sums of money are involved, and actions raising significant public issues. 10 Wright, Miller and Kane, Federal Practice and Procedure: Civil § 2681, pp. 404-05. There is no question that the present case involved material issues of fact. The case was tried to a jury which rendered a verdict in favor of the City of Madison on all issues of liability. The present case also involved significant public issues in that it raised claims of discrimination and retaliation in a public work place.

The Petitioner argues that the trial court had no discretion and was required to enter default judgment upon receipt of the Petitioner's motion. Petitioner is mistaken in this regard. Rule 55, Federal Rules of Civil Procedure, provides in relevant part:

> **(a) Entry.** When a party against whom a judgment for affirmative relief is sought has

> failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavits or otherwise, the clerk shall enter his default.

Fed.R.Civ.P. 55(a). Before entering a default, the clerk must be certain that all elements of a default have been proven by means of an affidavit or other competent proof. 10 Wright, Miller and Kane, Federal Practice and Procedure: Civil § 2682, pp. 406.

In the present action, the City of Madison did "otherwise defend." It was the City which removed this case to the United States District Court for the Western District of Wisconsin. This federal court action is part of a series of disputes between the parties arising out of Silva's employment with the City of Madison. There was no question that the City of Madison disputed those contentions raised by Silva in his Complaint in this action.

Additionally, before a default can be entered, the Court must have jurisdiction over the party against whom judgment is sought, "which also means that he must have been effectively served with process." 10 Wright, Miller and Kane, Federal Practice and Procedure: Civil § 2682, p. 407; *see also Wood v. Santa Barbara Chamber of Commerce, Inc.*, 507 F.Supp. 1128 (D.C. Nev. 1980). In the present action, there is no question that the City of Madison was not served with process at the time Silva requested that the trial court enter a default. Silva had no entitlement to entry of default judgment under the facts of this case and the trial court properly denied Silva's motion for default judgment.

The Petitioner is mistaken that the clerk of the district court has no discretion to enter default. The district court clerk must review the file and make certain that all elements entitling a party to a default are present. In the present case, a crucial element, service of process, was not present. The clerk of the court has discretion to not enter a default if the default will be set aside. In the present case, even had the clerk of the United States District Court for the Western District of Wisconsin entered a default, the trial court, in the exercise of its discretion, would have set aside the entry of default as a result of Silva's failure to properly serve process on the City of Madison.

The Petitioner had no entitlement to have default entered under Rule 55(a), Federal Rules of Civil Procedure. This is not a novel issue which would justify review by the United States Supreme Court.

Even if the district court had entered a default, it is likely that the trial court would have set the entry of default aside. It is undisputed that the trial court has discretion whether to enter a default judgment. Factors which the trial court may consider in determining whether to enter a default judgment include the amount of money involved, whether there are issues of fact involved, whether the default was largely technical, and whether the plaintiff was prejudiced by the delay. 10 Wright, Miller and Kane, Federal Practice and Procedure: Civil § 2685, pp. 423-24. In the present case, there clearly were disputed issues of fact involved and the case was tried to a jury which rendered a verdict on liability in favor of the City of Madison. Silva's contention that the

City was in default was largely technical. Silva's contention is based solely on a technical reading of Rule 81(c), Federal Rules of Civil Procedure. Additionally, it is clear that Silva was in no way prejudiced by any delay. Silva filed his action in state court on October 19, 1992. The federal district court held a jury trial on Silva's claims commencing April 12, 1993, less than six (6) months after the Petitioner filed his Complaint.

Courts of Appeals have held that entry of default may appropriately be set aside for failure to properly serve process. 10 Wright, Miller and Kane, Federal Practice and Procedure: Civil § 2696, pp. 516-518 (1983); *St. Louis Southwestern Ry. Company v. Yates*, 23 F.2d 283 (8th Cir. 1927). Accordingly, even had the district court clerk entered a default in this matter, the trial court would have set aside the entry of default for Silva's failure to properly serve the City.

Whether the trial court properly exercised its discretion in denying Silva's motion for entry of default judgment is dispositive of all issues in the Petition. This is not a novel issue which would justify the United States Supreme Court allocating its scarce resources to hear this issue. Accordingly, the City of Madison respectfully requests that the Court deny the Petition for a Writ of Certiorari.

## II. RULE 81(c), FEDERAL RULES OF CIVIL PROCEDURE, DOES NOT ALLOW FOR DEFAULT JUDGMENT WHERE A PARTY DEFENDANT HAS NOT BEEN PROPERLY SERVED WITH PROCESS.

The Petitioner argues that, despite not having served the City of Madison with process, Rule 81(c), Federal Rules of Civil Procedure, required that the Defendant answer or risk a default judgment. The trial court disagreed with the Petitioner's position and denied Silva's motion for entry of default judgment. Similarly, the United States Court of Appeals for the Seventh Circuit disagreed that Rule 81(c), Federal Rules of Civil Procedure, allowed for entry of default judgment where a party defendant had not been served with process. The determination that the trial court did not abuse its discretion in denying Silva's request for default judgment is dispositive of all issues in this matter. In any event, federal law prohibits entry of default judgment where a party has not been served with process, regardless of whether the action is a removed action such as in the present case, or an original federal court action.

Petitioner contends that there is a conflict in the circuits on the issue of whether service of process is necessary in a removed action before a court may enter a default judgment under Rule 55, Federal Rules of Civil Procedure. No such conflict exists. Petitioner cites the recent Seventh Circuit decision *Roe v. O'Donohue*, 38 F.3d 298 (7th Cir. 1994) for the proposition such a conflict exists. The *Roe* decision discussed the time period for removal of actions under 28 U.S.C. § 1446. The *Roe* decision did not consider the issue of whether default judgment could be entered where a party had not been

properly served with process. The Petitioner also cites to the Court the decision *Tech Hills II v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963 (6th Cir. 1993), for the proposition that there is a conflict in the circuits regarding the issue of whether default judgment is appropriate in a removed action where a party has not been served with process. The *Tech Hills* court, like the *Roe* court, considered only the issue of the timeliness of removal under 28 U.S.C. § 1446. The *Tech Hills* court did not consider or decide the question of whether default judgment in a removed case is appropriate where no service of process has occurred.

Finally, the Petitioner cites the 1975 Ninth Circuit decision *Savarese v. Edrick Transfer & Storage, Inc.*, 513 F.2d 140 (9th Cir. 1975), as authority for the proposition that there is a conflict in the circuits relating to whether service of process is necessary in a removed action before default judgment may be entered. In *Savarese*, the plaintiff filed his complaint in April, 1972, and the defendant removed the action to federal court in May, 1972. Plaintiff served the defendant with a copy of the summons and complaint, but failed to file an affidavit of service as required under state court procedure. The plaintiff, however, did file the affidavit of service in federal court on December 19, 1972. Accordingly, Rule 81(c), Federal Rules of Civil Procedure, required the Defendant to answer by January 11, 1973. The federal district court, in the *Savarese* case, did not enter default judgment until January 22, 1973. Therefore, in the *Savarese* case, the defendant had been properly served with process at the time default judgment was entered. In the present case, it is undisputed that the City of Madison had not been served with

process at the time the Petitioner sought entry of default judgment.

There is no conflict in the federal circuits on the issue of whether a trial court may enter a default where no service of process has been completed and the time periods for filing an answer under Rule 81(c), Federal Rules of Civil Procedure, have expired. A district court may not enter a default judgment under these circumstances. Rule 12, Federal Rules of Civil Procedure, provides the following time period for the filing of an answer:

> **(a) When Presented.** A defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state.

Fed.R.Civ.P. 12(a). Rule 81(c), Federal Rules of Civil Procedure, does not change the fundamental requirement that to enter a default judgment, the court must have jurisdiction over the person. The court obtains such jurisdiction where a person has been properly served with process. In the present case, no such service of process occurred. Because no federal court of appeals has expressly ruled that service of process is unnecessary in a removed action before a court may enter a default judgment pursuant to Rule 55, Federal Rules of Civil Procedure, no conflict on this issue exists between the circuits.

Even though there is no conflict in the circuits on this issue, the United States Supreme Court need not reach the issue of whether service of process is necessary prior to entry of default judgment in a removed action, because, even if entry of default judgment were permissible without service of process, as noted above, entry of default judgment remains in the discretion of the trial court. The trial court, in the present case, properly exercised its discretion in denying Silva's request for default judgment and the United States Court of Appeals for the Seventh Circuit affirmed, finding no abuse of discretion by the trial court in denying Silva's request for a default judgment.

## CONCLUSION

On the basis of the argument and authority set forth above, the Respondent City of Madison, Wisconsin respectfully requests that the United States Supreme Court deny the Petition for a Writ of Certiorari. The issue in this case is simply whether the trial court abused its discretion in denying Silva's request for default judgment. There is no conflict in the circuits on this issue. Additionally, there is no need to reach the issue of whether Rule 81(c), Federal Rules of Civil Procedure, allows for entry of default judgment in the absence of service of process in a removed action. Finally, there is no conflict in the circuits regarding the question of whether Rule 81(c), Federal Rules of Civil Procedure, allows for entry of default judgment in the absence of service of

process which would justify the United States Supreme Court using its limited resources to consider this issue.

Dated this 28 day of February, 1996.

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